1991

State of Utah v. C. Dean Larsen : Brief of Appellee

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Appellant,	:	Case No. 910314
v.	:	
	:	
C. DEAN LARSEN,	:	Category No. 2
	:	
Defendant-Appellee.	:	

BRIEF OF APPELLEE

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APPEAL FROM THE TRIAL COURT'S GRANT OF A CERTIFICATE OF PROBABLE CAUSE IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, JUDGE RUSSON

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Article VIII, Section 4, of the Utah Constitution, as amended, provides in pertinent part:

> The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

Utah Code Section 77-20-10 (1990) provides in pertinent part:

> (1) The court shall order that a defendant who has been found guilty of an offense and sentenced to a term of imprisonment in jail or prison, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the court finds:
>
> (a) the appeal raises a substantial question of law or fact likely to result in:
>
> (i) reversal;
>
> (ii) an order for a new trial; or
>
> (iii) a sentence that does not include a term of imprisonment in jail or prison;
>
> (b) the appeal is not for the purpose of delay; and
>
> (c) by clear and convincing evidence presented by the defendant that he is not likely to flee the jurisdiction of the court, and will not pose a danger to the physical, psychological, or financial and economic safety or well-being of any other person or the community if released.

Rule 27 of the Utah Rules of Criminal Procedure provides in relevant part:

> (2) A sentence of fine, imprisonment, or probation shall be stayed if an appeal is

taken and a certificate of probable cause is issued.

(3) When an appeal is taken by the state, a stay of any order or judgment in favor of the defendant may be granted by the court upon good cause pending disposition of the appeal.

(b) A certificate of probable cause shall be issued if the court hearing the application determines that there are meritorious issues that should be decided by the appellate court.

JURISDICTION AND NATURE OF PROCEEDINGS

The state asserts jurisdiction under Utah Code Section 78-2-2(3)(g), explaining that "in substance" the trial court held Utah Code Section 77-20-10 unconstitutional. (State's brief p. 1). This Court accepted jurisdiction under Utah Code Section 78-2-2(3)(g). (Minute Entry, Case No. 910314, State's brief Appendix C). It is unclear that jurisdiction lies for this matter. The district court did not declare section 77-20-10 unconstitutional; rather the district court held that Rule 27 is the governing law regarding the issuance of a certificate of probable cause for a stay of sentence pending appeal. (T. 5, 6, 10-11, 50). Uncertainty was also expressed by the Court of Appeals, which in transferring this case to the Supreme Court, stated that "[w]e make no determination whether the trial court's order granting a certificate of probable cause is a judgment appealable by the State." (Order of Transfer, Case No. 910172-CA, State's Brief Appendix B). Plainly, if this Court now

determines that the trial court did not hold Section 77-20-10 unconstitutional, no jurisdiction exists for this appeal.

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

The central issue on appeal is whether a stay of sentence pending appeal is governed by Rule 27 of the Utah Rules of Criminal Procedure or Utah Code Ann. section 77-20-10. The standard of review for this question is a "correction of error" standard. Provo City Corp. v. Willden, 768 P.2d 455, 456 (Utah 1984).

STATEMENT OF THE CASE

Following a jury trial, appellee C. Dean Larsen was convicted under Utah's securities fraud law, Utah Code Ann. §§ 61-1-1(2) and 61-1-21 (Supp. 1991). (R. 1434-51). Mr. Larsen was sentenced to a term of imprisonment. (R. 1424-91). Mr. Larsen was also ordered to pay a fine and restitution on each count. (Id.)

Following sentencing, Mr. Larsen filed a petition with the district court for a certificate of probable cause to stay execution of the sentence pending appeal. That appeal, which involves an issue of first impression regarding the necessary mental state for criminal liability under Utah securities law, is currently pending before the Utah Supreme Court by petition for certiorari. (Case No. 920114). The district court granted Mr. Larsen's petition and ordered that his "sentence is stayed

pending a final disposition of the matter on appeal." (Certificate of Probable Cause, March 4, 1991, attached as Appendix A to State's Brief). Mr. Larsen was required to post a $10,000 surety bond in addition to complying with all previous court orders regarding his release. (Id.)

The district court issued the Certificate of Probable Cause "pursuant to the provisions of Rule 27, U.R.CR.P. based upon the fact that the Court determines there are several issues that are novel or at least fairly debatable." (State's Brief, Appendix A; see also State v. Neeley, 707 P.2d 647, 649 (Utah 1985)(under Rule 27, "the question raised [on appeal] must be either (1) novel, i.e., there is no Utah precedent that governs, or (2) fairly debatable.")). The State appealed the district court's order granting the stay. The Utah Court of Appeals issued an Order of Transfer of the State's appeal to the Utah Supreme Court, stating that the trial court had "in effect" held Utah Code Section 77-20-10 unconstitutional. (Order of Transfer, Case No. 910172-CA, State's Brief Appendix B.)

STATEMENT OF FACTS

Facts beyond those set forth above concerning this case are unnecessary for this appeal.

SUMMARY OF ARGUMENT

The Trial Court correctly applied Rule 27, Utah R. Crim. P. in deciding Mr. Larsen's petition for certificate of

probable cause. Utah Code Ann. § 77-20-10 does not apply because the subject of release pending appeal is a procedural law matter within the Utah Supreme Court's authority.

The issue of whether the subject of release pending appeal is either procedural or substitutive law cannot be resolved simply by placement of a label as conflicting state court decisions reveal. A reasoned, issue-specific analysis, an analysis applied by the federal courts, reveals that the matter is one of procedural law within the Court's province, as this Court's treatment of Rule 27 reflects.

Section 77-20-10 cannot be characterized as an amendment to Rule 27, as the State urges, because the legislature did not expressly amend Rule 27 as required by Article V and Article VIII, Section 4 of the Utah Constitution. Article VIII, Section 4 and Article V of the Utah Constitution require a clear statement of legislature intent to amend rules promulgated by the Court. Section 77-20-10 also violates the United States Constitution. The trial court correctly concluded that Rule 27, not section 77-20-10, is the law to be applied.

ARGUMENT

THE TRIAL COURT CORRECTLY HELD THAT RULE 27 GOVERNS

The issue here appeal is whether the district court was correct in applying Rule 27 Utah R. Crim. P. and not section 77-20-10 to decide Mr. Larsen's request for a stay of sentence

pending appeal. In deciding the issue, it is useful first to chronicle how the Utah Supreme Court has regarded Rule 27 in the face of past efforts by the State to change the Rule. This appeal by the Utah Attorney General's office, as we explain below, is the most recent attempt among many to add more stringent conditions to the Court's requirements for stays pending appeal. Following this, we analyze the constitutional issues.

I. THE SUPREME COURT HAS CONSISTENTLY TREATED RULE 27 AS PROCEDURAL

Rule 27 was first adopted by the Court in 1985 when it issued the following Per Curiam Order:

> Pursuant to the provisions of Article VIII, Section 4, Constitution of Utah, as amended, the Court adopts all existing statutory rules of procedure and evidence not inconsistent with or superseded by rules of procedure and evidence heretofore adopted by this Court. Effective as of July 1, 1985.

In Re: Rules of Procedure and Evidence, 18 Utah Adv. Rep. 3 (1985)(copy attached as "Appendix A"). In promulgating these rules, the Court met its constitutional obligation: "[t]he Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process." Utah Const. art. VIII § 4; see also Utah Code Ann. § 78-2-4 (1992, enacted 1986)(containing same language as Utah Const. art. VIII § 4). The Supreme Court heralded the 1985 revision of Section 4 of Article VIII of the Utah

Constitution, noting that the changes were significant because "the Judicial Council and the Supreme Court now have the tools to manage their own affairs and to enhance their status as a co-equal branch of government." Code of Judicial Administration, Introduction ¶ 4.

Shortly after the Court adopted the Utah Rules of Criminal Procedure, including Rule 27, the State attempted to change the Rule 27 requirements, arguing that the standards of the 1984 Federal Bail Reform Act should be used. See State v. Neeley, 707 P.2d 647 (Utah 1985)(per curiam). The Court rejected this suggestion:

> Our rule does not contain the language urged by the State, but is rather patterned after the federal law prior to the 1984 changes. The previous federal law required that, in order to be admitted to bail pending appeal, a defendant must raise a substantial question which should be determined by the appellate court . . . .
>
> We hold that under our Rule 27, in issuing a certificate of probable cause preliminary to consideration of release pending appeal, the court must determine that the issues of fact or law raised on appeal are substantial.

Id. at 649 (emphasis added).

The State through the Attorney General then approached the 1986 Legislature with "proposed amendments" to Rule 27 resembling the language of section 77-20-10. (See May 15, 1986, Attorney General's Memorandum in Support of State's Petition for

Amendments, a copy of which is attached as Appendix B). Subsequently, the Attorney General's office petitioned the Court to amend Rule 27 directly, having concluded that "any proposed changes to Rule 27 should first be presented to the Utah Supreme Court which has the ultimate authority to adopt and amend rules of procedure." (State's 1986 Memo. p. 1, Appendix B). The petition requested that Rule 27 be amended to contain language similar to that of the Federal Bail Reform Act, 18 U.S.C. § 3143. (See State's Petition for Amendment to Rule, a copy is contained in Appendix C).[1]

As early as September 1987, changes to Rule 27 were being considered by the Supreme Court Advisory Committee on the Rules of Criminal Procedure.[2] Supreme Court Advisory Committees were established in all areas where the Court has rulemaking authority, including criminal procedure. Code of Judicial Administration Rule 11-101(1)(B). Advisory Committees, such as the Committee on Rules of Criminal Procedure, are established by

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[1]By Minute Entry on August 6, 1990, over two years after section 77-20-10 became effective, the Court stated: "Pursuant to passage of U.C.A. 77-20-10 on April 25, 1988. [sic]. This request for rule change is now resolved." The meaning of this order remains unclear in view of the relief originally sought by the State. (See State's 1986 Memo. pp. 6-9, Appendix B).

[2]See Minutes of Supreme Court Advisory Committee on the Rules of Criminal Procedure, Sept. 14, 1987, ¶ 6 (public record file kept by Administrative Office of the Courts)(Rule 27 subcommittee reports that "its work was steadily progressing" and that "the subcommittee was collecting Law Review Articles on the Federal Bail Reform Act"). The committee's work on Rule 27 continues today.

the Supreme Court pursuant to its authority and responsibility under Article VIII, Section 4, to adopt rules of procedure to be used by all courts of the state. Under this authority, the Court promulgated the Code of Judicial Administration to "establish[] a procedure for the adoption, repeal and amendment of rules of procedure and evidence." Code of Judicial Administration Rule 11-101(1)(A). The composition of Supreme Court Advisory Committees broadly represent the legal community, and should include "practicing lawyers, academicians, and judges" who "possess expertise within the committee's jurisdiction." Id. at Rule 11-101(1)(C).

Efforts continued in the legislature in January 1988 to alter the criteria for stays pending appeal through House Bill 79 (H.B. 79). (A copy of the entire H.B. 79 is attached as Appendix D). H.B. 79, sponsored by State Representative Ervin Skousen with assistance from counsel with the Attorney General's office,[3] passed and was codified as section 77-20-10 of the Utah Code. House Journal 47th Leg., Gen. Sess. 247 (Jan. 26, 1988); Senate Journal, 47th Leg., Gen. Sess. 732 (Feb. 23, 1988).

One year later, through its Article VIII rulemaking powers, the Utah Supreme Court issued another Per Curiam Order:

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[3]See Minutes of Supreme Court Advisory Committee on the Rules of Criminal Procedure, Feb. 8, 1988, ¶ 8 (Attorney with the Attorney General's office "assisted in the drafting and preparation of the legislation [H.B. 79]"). A copy of the entire Minutes for February 8, 1988 is contained in Appendix F.

> Pursuant to the provisions of article VIII, section 4 of the Constitution of Utah, as amended, and rule 11-101(3)(E) of the Code of Judicial Administration, the Court adopts all existing statutory rules of procedure and evidence contained in Utah Code Ann. §§ 77-35-1 to -33 (1982 & Supp. 1988) not inconsistent with or superseded by rules of procedure and evidence heretofore adopted by this Court, with the exception of section 77-35-12(g)(see State v. Mendoza, 748 P.2d 181 (Utah 1987)) and section 77-35-21.5(4)(c) and (d)(see State v. Copeland, 97 Utah Adv. Rep. 3 [765 P.2d 1266] (Dec. 6, 1988)). Effective as of January 1, 1989.

In Re: Rules of Procedure and Evidence to be Used in the Courts of this State (per curiam) (Utah S.Ct. Jan. 13, 1989) (copy attached as Appendix E). One of the statutes adopted by the Court as its own rule was Utah Code Section 77-35-27 (1982, repealed effective July 1, 1990)(copy attached as Appendix I) which contained language identical to Rule 27. Section 77-35-27, which concerned stays pending appeal, was adopted by the Court after the legislature passed section 77-20-10 which also purports to establish requirements for release pending appeal.

This history reflects that the Utah Supreme Court has consistently regarded the requirements under Rule 27 for obtaining a stay of sentence pending appeal to be a matter of procedure decided by the Court pursuant to its rulemaking authority under Article VIII, Section 4, of the Utah Constitution.

II. RELEASE PENDING APPEAL INVOLVES PROCEDURAL LAW

Determining whether a law is procedural, within the province of the Court, or substantive, and thus within the province of the legislature, is often a difficult task.[4] Generic definitions of what is procedural law and what is substantive law offer limited help depending upon the issue. As we explain below, a more practical approach, focusing on the subject at issue, and whether the issue has primarily been a function of the judiciary or of the legislature, is a more sensible way to determine which branch of government ought to be responsible for adopting rules with respect to the subject.

In Utah, a law is considered procedural, as opposed to substantive, if it "does not enlarge, eliminate, or destroy vested rights." Smith v. Cook, 803 P.2d 788, 792 (Utah 1990); Department of Social Serv. v. Higgs, 656 P.2d 998, 1000 (Utah 1982). In an early case, Petty v. Clark, 192 P.2d 589 (Utah 1948) the Utah Supreme Court offered the following definition of procedural and substantive law:

> Substantive law is defined as the positive law which creates, defines and regulates the rights and duties of the parties and which may give rise to a cause for action, as distinguished from adjective law which

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[4]This is evidenced by the fact that the Attorney General's Office has simultaneously petitioned this Court and the legislature in an effort to change the requirements for release pending appeal. See pp. 7-10 supra; see also Appendix B, p.1 (State's Memorandum in Support of its 1986 Petition).

> pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective.

Id. at 693-94 (quoted in Washington Nat'l Ins. Co. v. Sherwood Assoc., 795 P.2d 665, 668-69 (Utah App. 1990)).

No Utah case has expressly held that the standards for a stay of sentence pending appeal is procedural or substantive. However, as previously noted, the Court has issued two per curium Orders adopting Rule 27 along with the other Rules of Criminal Procedure pursuant to the Court's constitutionally-based procedural rulemaking power. See Appendices A and E. Consistently, (and as the State concedes) the Court in State v. Neeley, 707 P.2d 647 (Utah 1985) (Per Curium) referred to and treated Rule 27 as the Court's own rule. (State's 1986 Memo. pp. 7-8, Appendix B).

As the State recognizes, other state courts addressing whether this issue is procedural or substantive have reached different results, often for different reasons. (State's Brief pp. 10-12). Federal decisions, which the State does not consider, have consistently determined that the provisions of the Federal Bail Reform Act, on which Utah's section 77-20-10 was modeled (see infra at pp. 25-31), is a matter of procedural law. United States v. Ballone, 762 F.2d 1381, 1383 (11th Cir. 1985); United States v. Powell, 761 F.2d 1227, 1234 (8th Cir. 1985); United States v. Molt, 758 F.2d 1198, 1200-1201 (7th Cir. 1985);

United States v. Crabtree, 754 F.2d 1200 (5th Cir.) cert. denied 473 U.S. 905 (1985); United States v. Miller, 753 F.2d 19, 21 (3rd Cir. 1985). These decisions provide a useful analysis.

The Court of Appeals for the Tenth Circuit, in United States v. Affleck, 765 F.2d 944, 948-51 (1985)(en banc), agreed with the weight of federal authority that the standards of 18 U.S.C. Section 3143 governing bail pending appeal were procedural in nature, and therefore held that there was no violation of the ex post facto clause which only applies to substantive law. The reasoning of Affleck and other federal decisions is that requirements for release pending appeal are procedural because they do "'not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'" Id. at 948 (quoting Weaver v. Graham, 450 U.S. 24, 29 n.12, 101 S.Ct. 960, 964 n. 12 (1981)).

These decisions reflect a reasonable, issue-specific approach in deciding whether a rule is procedural or substantive law; for often a rule can be fairly characterized as being both procedural and substantive. See Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 107 S.Ct. 967, 970 (1987)("Rules regulating matters 'which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.'")(quoting Hanna v. Plumer, 380 U.S. 460, 472, 85 S. Ct. 1135 (1965)). The characterization of a law as substantive

or procedural depends on the purpose of the characterization. See Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 Duke L.J. 281 (1989); Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333, 335 (1933).

The above authorities reveal that the power to promulgate conditions for granting a stay of sentence pending appeal lies with the judiciary which has been the branch of government primarily and historically involved with this subject, as the Washington Supreme Court observed in State v. Smith, 527 P.2d 674 (Wash. 1974):

> [T]he fixing of bail and the release from custody traditionally has been, and we think is, a function of the judicial branch of government, unless otherwise directed and mandated by unequivocal constitutional provisions to the contrary. The power of the courts at common law is very well paraphrased in 8 Am. Jur.2d Bail & Recognizance, § 8 (1963), pp. 787-88
>
> > Authority to grant bail generally is incidental either to the power to hold a defendant to answer, or to the power to hear and determine the matter in which the defendant is held. At common law courts had inherent power to grant bail to prisoners before them and over whom they had jurisdiction. Granting bail and fixing its amount is generally a judicial or quasi-judicial function; . . .
>
> (Footnotes omitted.) Since the inherent power to fix bail is grounded in the power to hold a defendant, and thus relates to the manner of ensuring that the alleged offense will be heard by the court, we believe it to be implicit that the right to bail is essentially procedural in nature. Therefore,

> we hold that CrR 3.2(h) was validly promulgated by the Supreme Court pursuant to its inherent rule-making authority to prescribe rules of procedure.

527 P.2d at 677.

The State advances two reasons why release pending appeal ought to be considered substantive law. First, the State argues that labeling this issue as substantive is "consistent with article I, section 8(2)" in that release pending appeal is available "'only as prescribed by law.'" (State's Brief at p.13)(emphasis in State's Brief). In so doing, the State erroneously implies that the phrase "by law" means only "by statute." This is simply wrong. See Minutes of Const. Revision Comm., Jan. 15, 1988, p.2, ¶ 7 (January 15, 1988)(Attached as Appendix G)(State Constitutional Revision Commission intended "to retain the use of the phrase 'as prescribed by law' in the second paragraph [of Article I, § 8] because it can mean statutes, court rules, or court cases").

Second, the State aligns with a dissenting opinion in State v. Currington, 700 P.2d 942, 946-48 (Idaho 1985)(majority held that release pending appeal is procedural law), implying that denying bail pending appeal is appropriate as "punishment." This misperceives the purpose of bail. The purpose of bail is not punishment, but is to secure the defendant's continued attendance at future court proceedings. See In re Pipinos, 654 P.2d 1257, 1264 (Cal. 1982); State v. Musgrove, 610 P.2d 710, 712

(Mont. 1980); see also federal cases cited at pp. 12-13 supra, including United States v. Affleck, 765 F.2d 944, 948 (10th Cir. 1985).

Based on the above issue-specific analysis, the Court has been correct in regarding Rule 27 as a matter of procedural law properly within the Court's rulemaking power. This being so, Court Rule 27, not Section 77-20-10, controls the standard for release pending appeal unless and until the Court modifies the Rule, or until the legislature expressly amends Rule 27 by proper vote. See pp. 16-19 infra; see also Slusher v. Ospital by Ospital, 777 P.2d 437, 443 n. 12 (Utah 1989)(conflict between a court rule and a statute relating to rule must be resolved in favor of rule); Utah R. Crim. P. 1(c)(statutes in conflict with rules are repealed); People v. Williams, 577 N.E.2d 762, 764 (Ill. 1991), citing People v. Walker, 519 N.E.2d 890 (1988)(rule prevails over conflicting statute in matters within court's authority). Thus, the district court's decision to apply Rule 27 in issuing the Certificate of Probable Cause in this case should be affirmed.

III. SECTION 77-20-10 DID NOT AMEND RULE 27

Section 77-20-10 did not alter Rule 27 as the State suggests because the legislature did not expressly amend the rule as Article V, Section 1 and Article VIII, Section 4 of the Utah Constitution require. Section 4 of Article VIII empowers the

judiciary to "adopt rules of procedure . . . to be used in the courts of the state." The Utah Constitution confers a limited right on the legislature to "amend" these rules which must be considered in connection with the separation-of-powers provision of Article V, which states:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Const. Art. V § 1.

The legislature may "exercise the powers" conferred upon the judiciary only as "expressly directed or permitted" by the Utah Constitution. Id. The Constitution does not permit the legislature to promulgate Rules of procedure; the Constitution expressly provides only that "[t]he legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature." Utah Const. art. VIII § 4. Thus:

> Given the fact that the Utah Constitution places with this court the authority to promulgate rules of procedure and places certain limitations on the legislature's alterations of those rules, see Utah Const., Art. VIII, § 4, we certainly will not find that the legislature has intended to alter the operation of the rules of procedure absent a clear statement to that effect.

Carter v. Utah Power & Light Co., 800 P.2d 1095, 1097 n. 4 (Utah 1990). A "clear statement" that Section 77-20-10 was intended to amend Rule 27 is not found in the statute, either in its codified form or as H.B. 79. (See Utah Code Ann. § 77-20-10; a copy of H.B. 79 is attached as Appendix D). In fact, H.B. 79 expressly states that it "Amends" Utah Code Ann. §§ 77-20-1 and 77-20-8; it contains no reference to Rule 27. (Appendix D).

The legislature is aware that the correct method for attempting to alter procedural rules requires an express declaration of intent. See e.g., H.J.R. No. 26, 49th Leg., Gen. Sess. (Feb. 2, 1992)(copy in Appendix H). The first line of H.J.R. No. 26, a joint resolution concerning a "fully informed jury" proposal, declared its purpose of "AMENDING THE RULES OF CRIMINAL PROCEDURE . . . ." Id. This clear intent is repeated at the beginning and end of the resolution. Id. H.B. 79, which became section 77-20-10, contained no such language. (Appendix D).

Express legislative intent to amend is not only constitutionally required, it is necessary for the judiciary to function effectively. Under the State's view, courts may be forced to sift through legislation, first to identify all laws that passed by two-thirds vote of both the Senate and House of

Representatives,[5] and then scrutinize those enactments to determine if the legislation "sought to alter the standards" (State's Brief pp. 14-15) of any procedural rule and thus should be deemed an "amendment" to one or more procedural rules. This is unworkable and not contemplated by Article VIII, Section 4 of Utah's Constitution.

Further, rules of procedure may have retroactive effect in proceedings under way. See e.g., Department of Social Services v. Higgs, 656 P.2d 998, 1000 (Utah 1982); Smith v. Cook, 803 P.2d 788, 792 (Utah 1990). Thus, trial courts and counsel, unable to monitor the legislature or to discern readily whether a given statute amends a rule of procedure, could not labor free from the danger that the "wrong" rule would be applied. Additionally, without a "clear statement" of intent (an express amendment), as the Utah Constitution requires (Utah Const. art. V § 1; art. VIII § 4), legislation not intended to alter court rules could nonetheless provide fertile ground for argument that the converse is true. Appeals would proliferate.

The amendment-by-inference analysis urged by the State is unworkable and ill advised.

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[5]This is no small task; the clear majority of all legislation in Utah this year passed by at least two-thirds vote in both the house and senate. See House Journals, 49th Leg., Gen. Sess. Jan. 13-Feb. 26, 1992); Senate Journals 49th Leg., Gen. Sess., (Jan. 13-Feb. 26, 1992).

IV. SECTION 77-20-10 VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As noted in the jurisdictional statement set forth herein, it is unclear precisely what the trial court held with regard to Utah Code Section 78-20-10. This Court has invited the parties on this appeal to address the constitutionality of Section 77-20-10 on the basis that the trial court had effectively ruled the statute unconstitutional. On appeal, if the trial court's ruling can be supported on any basis this Court should uphold the ruling.

In addition to the Utah Constitutional infirmities associated with Section 77-20-10 as set forth in Parts II and III, supra (i.e. violation of the separation of powers provision of Article V § 1 and of the Judicial rulemaking provision of Article VIII § 4), the unique language in Section 77-20-10 also raises serious federal constitutional concerns if it were to be applied by Utah courts. Appellee briefly identifies these federal constitutional issues here.

Section 77-22-10 requires a showing "by clear and convincing evidence by the defendant" that his release pending appeal would not present a flight risk and that the defendant's release "will not pose a danger to the physical, psychological, or financial and economic safety or well-being of any other person or the community if released." (Emphasis added). This

underlined language in section 77-20-10 is the only part of the Utah statute which differs significantly from the language of 18 U.S.C. § 3143, of which the Utah statute is modeled. The cited additional language in section 77-20-10 violates the Eighth and Fourteenth Amendments to the U.S. Constitution because it is so vague and overbroad as to effectively and unreasonably preclude bail, especially as may be applied in this case.

Although courts have held that the U.S. Constitution does not guarantee a right to release on bail pending appeal, see e.g., Finetti v. Harris, 609 F.2d 594, 597 (2nd Cir. 1979), if a state implements a bail system, it must do so in a fair and reasonable manner, because the determination of bail affects significant issues regarding the liberty interests of individuals. United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct.2095, 2101 (1987); Young v. Hubbard, 673 F.2d 132 (5th Cir. 1982); Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), vacated as moot sub nom; Murphy v. Hunt, 455 U.S. 478 (1982). States have a legitimate interest in protecting its citizens from the potential for repeat offenses by defendants with a propensity for dangerous or violent crimes. However, the state's interest is much less compelling as to non-violent crimes. Yet Section 77-20-10 applies the same stringent bail requirements to persons convicted of economic crimes as persons convicted of violent crimes. The statute also makes no distinction between the seriousness of the

crime at issue. Misdemeanor defendants are not treated any differently than felony defendants--even those convicted of capital offenses.

In United States v. Salerno, the Supreme Court was faced with a challenge to a provision of the Federal Bail Reform Act covering pre-conviction detention based on findings that the accused had a propensity to commit additional crimes. The Court held that the provision did not violate due process and was reasonable, because that statute focused "only on individuals who have been arrested for a specific category of extremely serious crimes." 481 U.S. at 750. In Young v. Hubbard, 673 F.2d 132 (5th Cir. 1982) and Finetti v. Harris, 609 F.2d 594 (2nd Cir. 1979), denial of bail pending appeal was upheld because a state scheme in those cases was limited to questions of public safety and flight risk. However, there is no corresponding state interest in applying the same standard to defendants who can show that they pose no significant risk to the safety of the community, but who cannot demonstrate because of the vagueness of the statute that they do not pose a risk to the "psychological, financial or economic" safety of the community or "of any other person."

The language of section 77-20-10 is so vague and so broad that it defies definitions: What is "psychological safety"? What is "financial or economic safety"? This language

of the statute, which is a departure from the federal model, is so vague that judicial interpretation and definition of the terms in any meaningful way is impossible. While it may be overreaching to say that the state has no interest in protecting its citizenry from "economic" and "psychological" harm, the language of section 77-20-10 to protect that interest is overbroad. The standards used in relation to such economic concerns should not be governed by the same criteria as applied to persons convicted of violent crimes.

Whatever the language of section 77-20-10 means, there is no limitation on its application to defendants who pose no risk of violence or other legitimate state interest, no way to distinguish between defendants convicted of a misdemeanor as opposed to a felony, no way to distinguish between serious and violent crimes and status offenses, and no way to meet the burden of proving by a clear and convincing standard that release will not result in some sort of psychological discomfort or economic burden on a third party. In effect, the statute if read literally would result in the complete deprivation of access to bail.

In this case, Mr. Larsen was convicted of allegations that he failed to make certain disclosures in connection with securities offerings. See Petition for Certiorari, Case No. 920114. Mr. Larsen has no previous criminal record, is a long-

term resident of the State of Utah and has demonstrated at every stage of this case that he does not pose a flight risk. If this matter is remanded to the trial court with instructions to review the certificate of probable cause under the standards set forth in section 77-20-10, application of those standards in this case will result in a violation of the constitutional standard set forth above. If Mr. Larsen is to be detained under the statute, the only basis for doing so will be on the premise that he somehow poses a threat to the physical "economic or financial safety" of the community. That language as applied in this case clearly exceeds any valid state interest.

For the foregoing reasons, the trial court could have reasonably held that Section 78-22-10 was unconstitutional on its face[6] or as it may be applied in this case.

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[6]Judge McKay's dissent in United States v. Affleck, 765 F.2d 944, 955-61 (10th Cir. 1985) provides additional reasons why a statute such as Utah section 77-20-10 may be considered unconstitutional on its face. Judge McKay notes that in Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985), the Supreme Court found that where a state provides for an appeal as a matter of right, then "the procedures used in deciding appeals must comport with the due process and equal protection clauses of the constitution." Id. At 834. Accordingly, in Evitts, the court held that a defendant has a due process right to effective assistance of counsel on appeal because "in establishing a system of appeal as of right, the state has implicitly determined that it was unwilling to curtail drastically a defendant's liberty unless a second judicial decisionmaker, the appellate court, was convinced that the conviction was in accord with law." Id. At 840. The state was thus found to have "made the appeal the final step in the adjudication of guilt or innocence of the individual." Id. Evitts extended a defendant's fifth amendment right to counsel at trial to right to counsel on appeal where the state had affords defendants

V. IF THE COURT DETERMINES TO REMAND, IT SHOULD INSTRUCT THE TRIAL COURT TO INTERPRET SECTION 77-20-10 CONSISTENT WITH FEDERAL LAW

The State asks for reversal of the trial court's ruling and remand for reconsideration of the certificate of probable cause under Section 77-20-10. (State's Brief p. 15). The trial court's decision should not be disturbed, as we have explained. However, if this court determines to do so, it should instruct the trial court to interpret 77-20-10 consistent with its federal model for two reasons: First, the legislative history of the statute indicates that it was the intent of the legislature to follow with federal law on the issue of post-conviction release. Second, the interpretation adopted by the federal courts presents the only possible interpretation of 77-20-10 which avoids an absurd result.

A. The Legislature Intended Section 77-20-10 To Follow Federal Law

It is clear from the face of section 77-20-10 that, with one significant modification, the statute is modeled after 18 U.S.C. § 3143(b), which is part of the Federal Bail Reform Act

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a right to appeal as a matter of statutory right. The rationale of Evitts should apply to a defendant's eight amendment right to bail, which also had typically been held to only apply to the pre-trial stage. Inasmuch as Utah affords defendant's a statutory right to an appeal, see Utah code § 77-18a-1(1)(1991), the eighth amendment rights against excessive bail arguably attach to the appeal. To the extent that Section 77-20-10 excessively curtails this right, it violates the Eighth and Fourteenth amendments of the United States Constitution.

of 1984. The structure of the two statutes if virtually identical and both use virtually identical language in expressing the grounds for release on bail pending appeal. See Utah Code Ann. § 77-20-10; 18 U.S.C. § 3143.

In addition, the legislative history regarding this issue indicates that it was the intent of the legislature to align Utah and federal law. In introducing H.B. 79, which became section 77-20-10, representative Skousen, the sponsor of the bill, opened his comments by stating as follows:

> House Bill 79 had developed as a result of some experiences here in the community which reflect the fact that we need to bring all laws in conformance with the federal law. The federal law recently amended the bail requirements and specifications and our laws now presently do not conform to those federal laws.

(Transcribed from Official record of Utah State House of Representatives, Floor Debate re H.B.79, January 26, 1988).

The bill was introduced to the Senate by Senator Kay Cornaby, who stated as follows:

> I should emphasize this is post conviction only and it conforms to the federal statute. My understanding is that the drafter of the bill tracked the federal bail statute with post conviction remedies in structuring the amendment for Utah State.

(Transcribed from Official record of Utah State Senate, Floor Debate re H.B. 79, February 23, 1988. (emphasis added)).

The decisions of the federal courts deserve significant deference in interpreting state statutes modeled on federal law:

> Where a state statute is patterned after a federal statute, the decisions of the United States Supreme Court and inferior federal courts, interpreting the parent federal statute, are, even though they were handed down after the adoption by the state of the federal statute, most persuasive, particularly where such interpretations are the only ones extant with respect to the disputed words of the state statute.

75 Am. Jur. 2d Statutes § 335 (1974) (emphasis added); see also Reeves v. Gentile, 813 P.2d 111, 115 (Utah 1991) ('[t]he primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve"); State v. Taylor, 82 Ariz. 289, 312 P.2d 162, 165-66 (1957)(subsequent interpretation of federal statute was entitled to "great weight" in construing state statute); Geraghty v. National Bank of Commerce, 8 Wash.2d 437, 112 P.2d 846, 849 (1941).

From the foregoing it is clear that the legislature crafted section 77-20-10 to align Utah and federal law on the issue of post-conviction bail, and that federal case law should be followed in construing section 77-20-10.

B. The Federal Standard

Both section 77-20-10 and its federal-law model (18 U.S.C. § 3143) contain the following language: "raises a substantial question of law or fact likely to result in reversal

or an order for a new trial." 18 U.S.C. § 3413(b)(2); Utah Code Ann. § 77-20-10(1)(a). Taken at face value, as other courts have observed, this language arguably could be read to mean the trial court should only permit a post-conviction release if it is convinced that its own rulings and handling of the case were in error. The federal courts have recognized the inherent absurdity of this interpretation. In United States v. Greenberg, 772 F.2d 340 (7th Cir. 1985), the Seventh Circuit analyzed United States v. Miller, 753 F.2d 19, 23-24 (3rd Cir. 1985) and its definition of the quoted language:

> [T]he Third Circuit held that the quoted language entitled the defendant to bail pending appeal (provided he is not a danger to anyone or likely to flee, 18 U.S.C. § 3143(b)(1) if his appeal raises a substantial question that is likely to result in a reversal if the court of appeals answers the question in the way the defendants asks it to do. This of course is not what the language says; but if it were read literally, the district judge could not grant bail pending appeal unless he though the conviction was going to be reversed -- and if he thought that, why would he not have set aside the conviction himself without putting the defendant to the bother of appealing and us to the bother of reversing? The literal reading amounts to saying that district judges shall not grant bail pending appeal, leaving the courts of appeal with sole authority to do that . . . . If Congress meant to abolish the district court's power to grant bail pending appeal, it chose an awfully roundabout way of expressing its desire.

Greenberg, 772 F.2d at 341.

The following Federal Courts of Appeals agree with the Miller rational: United States v. Bilanzich, 771 F.2d 292, 297-98 (7th Cir. 1985); United States v. Affleck, 765 F.2d 944, 952-53 (10th Cir. 1985) (en banc); United States v. Handy, 761 F.2d 1279, 1280-83 (9th Cir. 1985); United States v. Powell, 761 F.2d 1227 (8th Cir. 1985) (en banc); United States v. Randell, 761 F.2d 122, 124-25 (2nd Cir.), cert. denied 474 U.S. 1008 (1985); and United States v. Valera-Elizondo, 761 F.2d 1020 (5th Cir. 1985); United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985) (per curiam).

The Court of Appeals for the 10th Circuit in Affleck, articulated what has come to be the federal standard for interpreting section 3143(b). The court adopted a two-part inquiry; first, does the appeal raise a "substantial" issue for appeal;" and second, "if the question is determined favorably to defendant on appeal, is that decision likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed." Id. at 953. Cf. Nealey, 707 P.2d at 649 (applying similar test under Rule 27, Utah R. Crim. P.). For purposes of this test, "substantially" has been interpreted to mean an issue which "is novel, has not been decided by controlling precedent, or which is fairly doubtful." Id. (quoting United States v. Miller, 753 F.2d at 23).

The Federal Courts of Appeal agree that Congress could not and did not intend to eliminate the procedural power of the district courts to grant bail to convicted defendants whose cases are on appeal by requiring a trial judge to somehow rule that his decisions in the case were erroneous and "likely to be reversed." Such a definition cannot be tolerated under federal law should not be tolerated under Utah law.[7]

Surely the Utah Legislature could not have expected a lower court judge to rule on an issue of law, and then conclude that he was likely wrong and would be reversed on appeal. If a trial court did have such an opinion, the court would more likely change his own decision before entering a final appealable order or judgment. Thus, a literal interpretation of section 77-20-10 is unworkable and nonsensical, and would place a release pending appeal beyond any defendant's reach. For this reason, federal courts have interpreted the federal statute very similar with this Court's interpretation of Rule 27. The legislative history of section 77-20-10 indicates that the legislation was designed to make Utah law consistent with federal law on this point; this

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[7]If Section 77-20-10 is applied literally, it would also be open to attack on numerous constitutional grounds as an arbitrary elimination of a statutory right to bail in violation of the Eighth Amendment and a violation of due process because a fair hearing would be impossible where a trial court is asked to act in effect as its own court of appeals. See Generally, Lay and Hunt, The Bail Reform Act of 1984: A discussion 11, William Mitchell L. Rev. 929, 950 (1985).

Court should implement that standard if it concludes that section 77-20-10 is the law to be applied in this case.

CONCLUSION

For the above reasons, the Court should affirm the trial court's decision to apply the standards of Rule 27 in granting a stay of sentence pending appeal.

DATED this 26th day of March, 1992.

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By _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing BRIEF OF APPELLEE on APPEAL FROM THE TRIAL COURT'S GRANT OF A CERTIFICATE OF PROBABLE CAUSE IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, JUDGE RUSSON to be mailed, postage prepaid, this 26th day of March, 1992, to the following:

R. PAUL VAN DAM
Attorney General
DAVID B. THOMPSON
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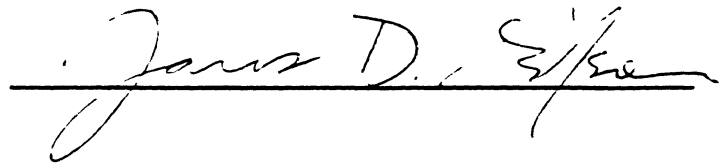
236 State Capitol
Salt Lake City, Utah 84114



APPENDIX

Tab A

[COMPILERS NOTE: This administrative order is published at the request of the Utah Supreme Court.]

IN THE SUPREME COURT OF THE STATE OF UTAH

In Re:

Rules of procedure and evidence to be used in the courts of this state.

FILED: September 10, 1985

PER CURIAM:

Pursuant to the provisions of Article VIII, Section 4, Constitution of Utah, as amended, the Court adopts all existing statutory rules of procedure and evidence not inconsistent with or superceded by rules of procedure and evidence heretofore adopted by this Court. Effective as of July 1, 1985.

Tab B

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE: RULE 27, UTAH RULES OF CRIMINAL PROCEDURE	:	MEMORANDUM IN SUPPORT OF STATE'S PETITION FOR AMENDMENTS

INTRODUCTION

The State of Utah, through the Attorney General, initially approached the 1986 Legislature with the proposed amendments to Utah R. Crim. P. 27 (UTAH CODE ANN. § 77-35-27 (1982)) that are contained in the State's petition. After H.B. 165, which contained the Rule 27 amendments, was approved by the House of Representatives, see HOUSE JOURNAL, 46th Leg., 1st Sess. 282 (daily ed. Jan 27, 1986), the sponsor of the bill and attorneys from the Attorney General's Office and the Statewide Association of Prosecutors agreed that any proposed changes to Rule 27 should first be presented to the Utah Supreme Court which has the ultimate authority to adopt and amend rules of procedure. Accordingly, the State filed its petition for amendment to that rule.

DISCUSSION

A.

Under the recently amended version of article VIII, section 4 of the Utah Constitution,[1] which was approved by the voters in November 1984 and became effective on July 1, 1985, this Court has the ultimate authority to adopt and amend rules of procedure. The amendments to article VIII constitutionalized the Court's rule-making authority, which had previously only been accorded by statute. See UTAH CODE ANN. § 78-2-4 (1977); 1943 Utah Laws ch. 33, § 1 (which gave the Court rule-making power in all civil actions). The Legislature may amend the rules of procedure adopted by the Court only upon a vote of two-thirds of the members of both houses. UTAH CONST. art. VIII, section 4. In a recent opinion in a criminal case, State v. Banner, 32 Utah Adv. Rep. 5, ___ P.2d ___ (1986), this Court noted that, under

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[1] Article VIII, section 4 now states:

> The supreme court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The legislature may amend the rules of procedure and evidence adopted by the supreme court upon a vote of two-thirds of all members of both houses of the legislature. Except as otherwise provided by this constitution, the supreme court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The supreme court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

§ 78-2-4,[2] "[t]he limitations on rules announced by this Court which supplant legislative enactments are that the Court may not change the substantive rights of any litigant; the rules must only be procedural in nature." 32 Utah Adv. Rep. at 10. Banner referred to Brickyard Homeowners' Ass'n. v. Gibbons Realty, 668 P.2d 535, 539 (Utah 1983), as instructive on the distinction between procedural rules and substantive rules. In Brickyard, 668 P.2d at 539, the Court approved of the following standard set forth in Avila South Condominium Ass'n., Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1977):

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.
>
> Examination of many authorities leads me

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[2] Section 78-2-4 provides:

> The Supreme Court of the State of Utah has power to prescribe, alter and revise, by rules, for all courts of the State of Utah, the forms of process, writs, pleadings and motions and the practice and procedure in all civil and criminal actions and proceedings, including rules of evidence therein, and also divorce, probate and guardianship proceedings. Such rules may not abridge, enlarge or modify the substantive rights of any litigant. Upon promulgation the Supreme Court shall fix the date when such rules shall take effect and thereafter all laws in conflict therewith providing for procedure in courts only shall be of no further force and effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed by the Supreme Court.

> to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules or practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution. See Kellman v. Stoltz, 1 F.R.D. 726 (N.D., Iowa, 1941).

347 So.2d at 608 (quoting In re Florida Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972) (Adkins, J., concurring)). The proposed amendments to Rule 27 should be evaluated against this standard.

In In Re: Rules of Procedure and Evidence, 18 Utah Adv. Rep. 3 (1985), the Court stated:

> Pursuant to the provisions of Article VIII, Section 4, Constitution of Utah, as amended, the Court adopts all existing statutory rules of procedure and evidence not inconsistent with or superseded by rules of procedure and evidence heretofore adopted by this Court. Effective as of July 1, 1985.

This pronouncement, when viewed in light of the rule-making standard noted in Banner and Brickyard, raises several issues. First, there is the question of the extent to which the Court adopted as its rule of criminal procedure the provisions contained in the Rule 27 enacted by the Legislature in 1980 and codified in UTAH CODE ANN. § 77-35-27. 1980 Utah Laws ch. 14, § 1. Since receiving full rule-making power in 1943, the Court apparently has never independently devised and adopted rules of criminal procedure; the Legislature has historically performed this task. See UTAH CODE ANN. § 105-1-1 et seq. (1943); UTAH

CODE ANN. § 77-1-1 et seq. (1953); UTAH CODE ANN. § 77-1-1 et seq. (1978); UTAH CODE ANN. § 77-35-1 et seq. (1982).[3] This has not been the case with the rules of civil procedure or the rules of evidence. See Banner, 32 Utah Adv. Rep. at 10; Brickyard, 668 P.2d at 539. In Re: Rules of Procedure marks the first time that the Court has independently adopted rules of criminal procedure; and it did so through an apparent wholesale adoption of the legislatively enacted rules contained in UTAH CODE ANN. § 77-35-1 et seq. (1982). There being no previously Court-adopted rules of criminal procedure, the Legislature's rules presumably are now the Court's rules--unqualified.

The provisions of Rule 27 (§ 77-35-27) which the State wishes to have amended relate directly to a convicted defendant's eligibility for release pending appeal--something that appears to involve substantive law rather than procedural law.[4] See Avila, 347 So.2d at 608. Assuming that a criminal defendant's qualified constitutional right to bail before trial, see UTAH CONST. art. I, § 8 (Supp. 1985); Carlson v. Landon, 342 U.S. 524, 545-46 (1952); cf. Bell v. Wolfish, 441 U.S. 520, 534 n. 15 (1979) (where the Court refused to decide the open question of whether the eighth amendment provides a right to bail in cases where the defendant is not likely to flee), may be further restricted after conviction, see United States v. Affleck, 765 F.2d 944, 948 (10th

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[3] In 1980, the Legislature, for the first time, specifically designated the rules of criminal procedure and set them apart in chapter 35 of title 77.

[4] To the contrary, subsection (a) of Rule 27 appears to be procedural only.

Cir. 1985) (en banc) ("There is no constitutional right to bail pending appeal."), the question of when a convicted defendant may be released with or without bail pending appeal seems to be one which involves the fixing and declaration of an individual's primary rights rather than simply the method or process by which a party enforces substantive rights.[5] Indeed, the State's proposed changes seek to restrict those who are eligible for release pending appeal in two significant ways: (1) narrowing the class of defendants who are eligible for a certificate of probable cause by requiring a showing of "a substantial question of law or fact likely to result in reversal or an order for a new trial," and (2) restricting release of defendants issued a certificate to those who can demonstrate by clear and convincing evidence that they will not flee or present a danger to any other person or the community. See State v. Neeley, 707 P.2d 647, 649 (Utah 1985) (which sets forth a less restrictive standard for the defendant regarding the substantiality of issues presented on appeal); State v. Pappas, 696 P.2d 1188, 1190 (Utah 1985) (holding that, once a certificate of probable cause is issued, "there should be a strong showing of the necessity of custody before bail is denied"). This Court seemingly recognized the substantive nature of the rule when the State previously requested that Rule 27(b) be construed in accordance with the

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[5] The apparent mixture of substantive and procedural elements in § 77-35-27 may have been an oversight by the Legislature. Creation of the qualified right to release pending appeal probably would have been more appropriate outside of the context of a rule of criminal procedure.

language now proposed for subsection (b) in the instant petition. See Neeley, 707 P.2d at 648-49 (observing that the language from the federal 1984 Bail Reform Act relied on by the State reflected several changes which marked a "'significant departure from the basic philosophy' of the purpose of bail"). Thus, if the Court adopted subsections (b) and (c) of § 77-35-27 as part of its own Rule 27, it arguably did so in violation of the rule-making standard enunciated in Banner and Brickyard. Therefore, it is imperative that the Court first designate which provisions in § 77-35-27 it has adopted as part of its rule of criminal procedure. When this is made clear, the State will know which governmental body it should petition for the proposed changes in the law. For example, if the Court decides it did not adopt subsections (b) and (c) of § 77-35-27 because they contain matters of substantive rather than procedural law, the State will submit its amendments to the Legislature, knowing that, because a Court rule is not involved, the two-thirds majority vote required under article VIII, section 4 will not be necessary for adoption of the amendments.[6] On the other hand, if the Court did adopt those subsections, the State's petition for amendments is properly before the Court. Interestingly, in Neeley, a case decided after In Re: Rules of Procedure was issued, the Court proceeded as though subsection (b) of § 77-35-27 was the Court's

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[6] The assumption would be that § 77-35-27(b) and (c) would remain in effect as provisions of substantive law duly enacted by the Legislature. 1980 Utah Laws ch. 14, § 1. Not being part of a Court-adopted rule of procedure, amendments to those provisions would not require the constitutionally mandated two-thirds majority for legislative amendment to such a rule.

rule. Indeed, if Neeley is interpreted as indicative of the Court's belief that it was appropriate to adopt all of the legislatively enacted Rule 27 pursuant to the Court's rule-making function, there appears to be no obstacle to consideration of the State's proposed amendments to that rule in this forum.

B.

Assuming that the State's petition is properly before the Court, the proposed amendments to Rule 27 should be adopted. The language the State requests the Court to adopt is similar to that found in a federal statute enacted as part of the 1984 Bail Reform Act. See 18 U.S.C. § 3143(b) (1985). The purpose of the federal legislation was to reverse the former presumption in favor of bail even after conviction. Two important principles are thereby furthered:

> Once guilt of a crime has been established in a court of law, there is no reason to favor release pending imposition of sentence or appeal. The conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law.
>
> Second, release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law, especially in those situations where an appeal of the conviction may drag on for many months or years.

S. Rep. No. 98-225, 98th Cong., 2d Sess. 26, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3209. See also United States v. Austin, 614 F.Supp. 1208, 1212 n. 13 (D.C.N.M. 1985). For these same reasons, Utah should incorporate the federal position. Furthermore, the proposed changes to Rule 27 would eliminate the ambiguities in this Court's "novel" or "fairly debatable"

standard for determining what is a "meritorious issue" on appeal.[7] Neeley, 707 P.2d at 649.

Finally, although this Court has never addressed the constitutionality of Rule 27, there can be little dispute that the current rule, as well as the proposed amendments, do not violate the bail or due process provisions of the fifth and eight amendments to the United States Constitution. Affleck, 765 F.2d at 948; United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985); United States v. Powell, 761 F.2d 1227, 1234 (8th Cir. 1985). And, although Utah's constitutional provisions on those subjects are textually somewhat different from their federal counterparts, there appears to be no good reason to interpret them so as to invalidate the pertinent provisions of current Rule 27 or the proposed changes to that rule. See UTAH CONST. art. I, §§ 7 and 8 (1971 & Supp. 1985). But see Affleck, 765 F.2d at 955-59 (McKay, J., dissenting). Significantly, this Court has never expressed any doubts about placing restrictions on a convicted person's freedom pending appeal. See, e.g., Neeley; Pappas.

CONCLUSION

Several interrelated issues must be resolved in the process of disposing of the State's petition for amendments to Utah R. Crim. P. 27. It appears that the Court first needs to

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[7] This is not to say that the newly enacted federal standard has not engendered some debate as to its proper interpretation and application. Compare Affleck, 765 F.2d at 952, with United States v. Miller, 753 F.2d 19, 23 (3rd Cir. 1985). However, overall that standard is clearer than the one opted for in Neeley.

make clear which provisions of § 77-35-27 it adopted as its own Rule 27 when it issued In Re: Rules of Procedure. This will necessarily require an analysis of the limitations on the Court's rule-making authority noted in Banner and Brickyard. The Court may then either reject the State's petition as a request for changes in substantive law, or consider the merits of the proposed amendments to Rule 27. If the merits are reached, those amendments should be adopted for the reasons previously stated.

DATED this 15th day of May, 1986.

DAVID L. WILKINSON
Attorney General

David B. Thompson
DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF HAND-DELIVERY

I hereby certify that a true and exact copy of the foregoing Memorandum was hand-delivered to Gregory G. Skordas, Salt Lake Legal Defenders Assn., 333 South Second East, Salt Lake City, Utah 84111, this 16th day of May, 1986.

David B. Thompson

Tab C

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE: RULE 27, UTAH RULES OF CRIMINAL PROCEDURE	:	PETITION FOR AMENDMENT TO RULE

The State of Utah, through its counsel, David B. Thompson, Assistant Attorney General, petitions this Court for the following amendments to Utah R. Crim P. 27 (codified as UTAH CODE ANN. § 77-35-27 (1982)):

77-35-27. Rule 27--Stays pending appeal. (a)(1) A sentence of death shall be stayed if an appeal or a petition for other relief is pending.

(2) A sentence of fine, imprisonment, or probation shall be stayed if an appeal is taken and a certificate of probable cause is issued.

(3) When an appeal is taken by the state, a stay of any order or judgment in favor of the defendant may be granted by the court upon good cause pending disposition of the appeal.

(b) A certificate of probable cause shall be issued if the court ~~hearing the application~~ determines that ~~there are~~

~~meritorious issues that should be decided by the appellate court~~ the defendant has filed a notice of appeal and that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial. ~~A certificate of probable cause may be issued by the trial court or, if denied by the trial court, by the court to whom an appeal is taken.~~ Application for a certificate of probable cause must be made to the trial court. The trial court's decision on the application is subject to review by the court in which the appeal is pending. The application for a certificate of probable cause shall be in writing, state the grounds for the issuance of the certificate and shall be served upon the prosecuting attorney. A hearing on the application for a certificate of probable cause shall be held after notice to all parties.

(c) If a certificate of probable cause is denied, the defendant shall commence or continue to undergo sentence. If the certificate of probable cause is granted, the court granting the certificate may continue the defendant in custody at an appropriate place of detention, or admit the defendant to bail or release pending appeal on suitable terms and conditions. The court shall not release the defendant pending appeal unless it finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released. The decision on the request of the defendant for release ~~to bail~~ pending appeal is subject to review

by the ~~appellate~~ court in which the appeal is pending for abuse of discretion.

DATED this 19th day of February, 1986.

DAVID L. WILKINSON
Attorney General

David B. Thompson

DAVID B. THOMPSON
Assistant Attorney General

Tab D

Chapter 4, Laws of Utah 1987

Be it enacted by the Legislature of the state of Utah:

Section 1. Section Repealed and Reenacted.

Section 59-2-1317, as renumbered and amended by Chapter 4, Laws of Utah 1987, is repealed and reenacted to read:

59-2-1317. Index of propety owners and taxes - Tax notice - Collection of taxes.

(1) Upon receipt of the assessment roll, the county treasurer shall index the names of all property owners shown by the assessment roll. The commission shall prescribe a form of index which shall be uniform in all the counties throughout the state.

(2) The treasurer shall proceed to collect the taxes and furnish to each taxpayer, except those taxpayers under Sections 59-2-1302 and 59-2-1307, by mail, postage prepaid, or leave at the taxpayer's residence or usual place of business, if known, a notice containing: (a) the kind and value of property assessed to the taxpayer; (b) the street address of the property, where applicable; (c) the amount of tax levied; and (d) if no notice has been provided under Section 59-2-919, the days fixed by the county board of equalization for hearing complaints. The notice shall set out the aggregate amount of taxes to be paid for state, county, city, town, school, and other purposes.

(3) If the property has been preliminarily sold for a prior tax within a period of four years and has not been redeemed, the treasurer shall stamp on the notice "Prior taxes are delinquent on this parcel. Final tax sale pending." The notice shall set out separately all taxes levied only on a certain kind or class of property for a special purpose or purposes, and shall have printed or stamped on it the effective rate of taxation for each purpose for which taxes have been levied, when and where payable, the date the taxes will be delinquent, and the penalty provided by law.

(4) The notice shall be mailed at least ten days before the first day the county board of equalization meets to hear complaints if no increase in the certified tax rate is proposed, or by November 1 if an increase in the certified tax rate is proposed under the procedures established in Section 59-2-919. The notice shall be in duplicate form and the county treasurer need not mail out a tax receipt acknowledging payment.

(5) After notices have been mailed, the county treasurer shall make available the assessment roll, map books, and statements to the clerk of the county board of equalization.

Section 2. Retrospective operation.

This act has retrospective operation to January 1, 1988.

H. B. No. 79

Passed 2-24-88, Approved 3-15-88
Effective 4-25-88
Laws of Utah 1988, Chapter 160

Bail Amendments

By Ervin M. Skousen

An Act relating to criminal procedure; providing guidelines for the release of a person sentenced to incarceration during an appeal of the sentence.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:
77-20-1, as enacted by Chapter 15, Laws of Utah 1980
77-20-8, as enacted by Chapter 15, Laws of Utah 1980

ENACTS:
77-20-8.5, Utah Code Annotated 1953
77-20-10, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section Amended.

Section 77-20-1, Utah Code Annotated 1953, as enacted by Chapter 15, Laws of Utah 1980, is amended to read:

77-20-1. Right to bail - Cases requiring hearing.

(1) A person charged with or arrested for a public offense shall be admitted to bail as a matter of right [~~in all cases~~], except where the proof is evident or the presumption of guilt is strong that the accused committed a:

[~~(1) A~~] (a) capital offense;

[~~(2) A~~] (b) felony while he was free on bail awaiting trial on a previous felony; or

[~~(3) A~~] (c) felony while he was on probation or parole for a felony.

(2) [~~In these cases~~] Under Subsection (1), the accused may be admitted to bail only by a [~~magistrate~~] circuit or district court judge, or upon the circuit or district court's refusal[~~,~~] and upon good cause shown, by a judge of the Court of Appeals, or a justice of the Supreme Court, after hearing and finding that the interests of justice do not require detention without bail.

Section 2. Section Amended.

Section 77-20-8, Utah Code Annotated 1953, as enacted by Chapter 15, Laws of Utah 1980, is amended to read:

77-20-8. Grounds for detaining or releasing defendant on conviction and prior to sentence.

(1) (a) Upon conviction, by plea or trial, the court [~~may~~] shall order [a] that the convicted defendant [~~to be taken into custody or may order the bail continued pending imposition of~~] who is waiting imposition or execution of sentence be detained, unless the court finds by clear and convincing evidence presented by the defendant that the defendant

is not likely to flee the jurisdiction of the court and will not pose a danger to the physical, psychological or financial and economic safety or well being of any other person or the community if released

(b) If the court finds the defendant does not need to be detained, the court shall order the release of the defendant on suitable conditions, which may include the conditions under Subsection 77-20-10(2)

~~[The sureties may, at any time prior to a forfeiture of their bail, surrender the defendant and obtain exoneration of their bail by filing written requests therefor at the time of the surrender.]~~

~~[(2) To effect surrender, a certified copy, in duplicate, of the undertaking shall be delivered to a peace officer, who shall then detain the defendant in his custody as upon a commitment, and who shall in writing acknowledge the surrender upon one copy of the undertaking. This certified copy of the undertaking upon which the acknowledgment of surrender is endorsed shall be filed with the court. The court may then, upon proper application, order the undertaking exonerated and may order a refund of any premium paid, or part of a premium, as it deems just.]~~

~~[(3) For the purpose of surrendering the defendant, the sureties, at any time before they are finally exonerated and at any place within the state, may arrest him.]~~

Section 3. Section Enacted.

Section 77-20-8.5, Utah Code Annotated 1953, is enacted to read

77-20-8.5. Sureties - Surrender of defendant - Arrest of defendant.

(1) (a) The sureties may at any time prior to a forfeiture of their bail surrender the defendant and obtain exoneration of their bail by filing written requests at the time of the surrender.

(b) To effect surrender, certified duplicate copies of the undertaking shall be delivered to a peace officer, who shall detain the defendant in his custody as upon a commitment, and shall in writing acknowledge the surrender upon one copy of the undertaking. This certified copy of the undertaking upon which the acknowledgment of surrender is endorsed shall be filed with the court. The court may then, upon proper application, order the undertaking exonerated and may order a refund of any paid premium, or part of a premium, as it finds just

(2) For the purpose of surrendering the defendant, the sureties may arrest him at any time before they are finally exonerated and at any place within the state

Section 4. Section Enacted.

Section 77-20-10, Utah Code Annotated 1953, is enacted to read

77-20-10. Grounds for detaining defendant while appealing his conviction - Conditions for release while on appeal.

(1) The court shall order that a defendant who has been found guilty of an offense and sentenced to a term of imprisonment in jail or prison, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the court finds:

(a) the appeal raises a substantial question of law or fact likely to result in:

(i) reversal,

(ii) an order for a new trial; or

(iii) a sentence that does not include a term of imprisonment in jail or prison

(b) the appeal is not for the purpose of delay, and

(c) by clear and convincing evidence presented by the defendant that he is not likely to flee the jurisdiction of the court, and will not pose a danger to the physical, psychological, or financial and economic safety or well-being of any other person or the community if released

(2) If the court makes a finding under Subsection (1) which justifies not detaining the defendant, the court shall order the release of the defendant, subject to conditions that result in the least restrictive condition or combination of conditions that the court determines will reasonably assure the appearance of the person as required and the safety of any other person and the community. The conditions may include that the defendant:

(a) post appropriate bail;

(b) not commit a federal, state, or local crime during the period of release;

(c) remain in the custody of a designated person who agrees to assume supervision of the defendant and who agrees to report any violation of a release condition to the court, if the designated person is reasonably able to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(d) maintain employment, or if unemployed, actively seek employment;

(e) maintain or commence an educational program;

(f) abide by specified restrictions on personal associations, place of abode, or travel;

(g) avoid all contact with the victims of the offense and with any witnesses who testified against the defendant or potential witnesses who may testify concerning the offense if the appeal results in a reversal or an order for a new trial;

(h) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other designated agency;

(i) comply with a specified curfew;

(j) not possess a firearm, destructive device, or other dangerous weapon;

(k) not use alcohol, or any narcotic drug or other controlled substances except as prescribed by a licensed medical practitioner;

(l) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain under the supervision of or in a specified institution if required for that purpose;

(m) execute an agreement to forfeit, upon failing to appear as required, designated property, including money, as is reasonably necessary to assure the appearance of the defendant, and post with the court indicia of ownership of the property or a percentage of the money as the court may specify;

(n) execute a bail bond with solvent sureties in an amount necessary to assure the appearance of the defendant as required;

(o) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(p) satisfy any other condition that is reasonably necessary to assure the appearance of the defendant as required and to assure the safety of any other person and the community; and

(q) if convicted of committing a sexual offense or an assault or other offense involving violence against a child 17 years of age or younger, is limited or denied access to any location or occupa where children are including but not limited to

(i) any residence where children are on the pr ses

(ii) activities including organized activities which children are involved and

(iii) locations where children congregate or wh a reasonable person should know that child congregate

(3) The court may, in its discretion amend order granting release to impose additional or d erent conditions of release

Tab E

COURT RULES

SUPREME COURT OF UTAH

IN RE: RULES OF PROCEDURE AND EVIDENCE TO BE USED IN THE COURTS OF THIS STATE

Effective January 1, 1989

PER CURIAM:

Pursuant to the provisions of article VIII, section 4 of the Constitution of Utah, as amended, and rule 11-101(3)(E) of the Code of Judicial Administration, the Court adopts all existing statutory rules of procedure and evidence contained in Utah Code Ann. §§ 77-35-1 to -33 (1982 & Supp.1988) not inconsistent with or superseded by rules of procedure and evidence heretofore adopted by this Court, with the exception of section 77-35-12(g) (*see State v. Mendoza*, 748 P.2d 181 (Utah 1987)) and section 77-35-21.5(4)(c) and (d) (*see State v. Copeland*, 97 Utah Adv.Rep. 3 [765 P.2d 1266] (Dec. 6, 1988)). Effective as of January 1, 1989.

FILED
January 13, 1989

Geoffrey J. Butler
Clerk

Tab F

MINUTES

SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF CRIMINAL PROCEDURE
Monday, February 8, 1988, 5:30 p.m.
Administrative Office of the Courts

Stewart M. Hanson Jr., Presiding

PRESENT	EXCUSED
Stewart M. Hanson, Jr.	Marcus Taylor
Judge Rodney S. Page	Judge Cullen Christensen
Judge Tyrone Medley	Robert Stott
David Schwendiman	Prof. Michael Goldsmith
Earl Dorius	Jo Carol Nesset-Sale
Peter Stirba	Karma Dixon
Judge Dennis Fuchs	Brooke Wells
Prof. Lionel Frankel	

Staff

Carlie Christensen

1. Welcome. Stewart Hanson welcomed the committee members to the meeting.

2. Minutes. The committee voted to approve the minutes from the January 25, 1988 meeting.

3. Rule 11. Chairman Hanson reported that he had reviewed Rule 11 in its entirety for the purpose of revising the rule and making it gender neutral throughout. Mr. Hanson recommended three specific changes. First, he recommended that the word "his" be deleted from the second sentence in paragraph (C) of the rule and that the sentence read "In non-felony cases, the court shall advise the defendant or counsel of the requirements for making a written demand for a jury trial." Second, he recommended that the phrase "his/her" in subsection (E)(1) of the rule be amended to "the" so that the sentence would read "That if the defendant is not represented by counsel, defendant has knowingly waived the right to counsel and does not desire counsel." Finally, he recommended that the phrase "his/her" in subparagraph (E)(5) of the rule be amended to "a" so that the sentence would read "That the defendant is competent to enter a plea."

Chairman Hanson then suggested that the committee discuss the issues resulting from the ambiguous language contained in 11(G). Earl Dorius suggested that the

language of 11(G) implies that the plea has already been entered and that the confusion could be eliminated with a modification to 11(G). He recommended that the word "Thereafter" be deleted in the last sentence of 11(G) and that after the phrase "If the judge decides," in that same sentence, the language "after the plea has been entered" should be added. Judge Page agreed with Mr. Dorius' recommendation and indicated that the confusion arose from the ambiguity as to whether the judge changed his or her mind after the entry of the plea.

Mr. Dorius questioned whether 11(G) should be modified to contain specific language prohibiting a Judge from engaging in the plea bargaining process. Judge Fuchs indicated that the Code of Judicial Conduct prohibited judges from engaging in ex parte communications with counsel and that such a prohibition should be sufficient.

Judge Fuchs moved to approve Rule 11 with the modifications recommended by Chairman Hanson and Mr. Dorius. Judge Medley seconded the motion. The committee voted unanimously to approve Rule 11 and distribute it for public comment.

4. Rule 11 Advisory Comments. Chairman Hanson recommended that the committee review and discuss the proposed advisory comments to Rule 11 so that the proposed comments could be approved and published with the rule. He referred the committee to the proposed comments which had been distributed at the last meeting and asked the committee members whether there was any discussion. Mr. Dorius suggested that the comments should include an explanation about the revisions to 11(G). Chairman Hanson indicated that the comments included an explanation that the changes to the rule were made to promote clarity and to remove gender biased language. He suggested that the existing explanation would be sufficient.

David Schwendiman made a motion to approve the advisory comments. Judge Page seconded the motion. The committeed voted unanimously to approve the proposed advisory comments and publish them with the rule for public comment.

5. Rule 27. Chairman Hanson asked whether the Rule 27 subcommittee was prepared to discuss further modifications to Rule 27. David Schwendiman indicated that the members of the subcommittee had not had the opportunity to research the issues raised at the last committee meeting and requested that the dicussion on Rule 27 be deferred until the next committee meeting.

6. Rule 12. Chairman Hanson indicated that in light of the Utah Supreme Court's recent decision in State v. Mendoza, that the committee should study Rule 12. Chairman Hanson suggested that a subcommittee be established to study the rule and asked which committee members would like to serve on the subcommittee. After some discussion, Chairman Hanson appointed Peter Stirba as the Chair of the subcommittee and appointed David Schwendiman, Earl Dorius, Professor Frankel and Marcus Taylor as members.

7. Criminal Procedure Subcommittee. Carlie Christensen explained that the committee as a whole needed to begin its study of the rules of criminal procedure to determine which are substantive and which are procedural and should be repealed from the Utah Code. Ms. Christensen reminded the committee that legislation had been introduced this year to repeal all of the rules of criminal procedure but that the sponsor of the legislation had agreed to withdraw it until the advisory committee had the opportunity to study the rules and make recommendations.

Chairman Hanson suggested that the committee needed to review the law in this area prior to undertaking its study of the rules and asked Ms. Christensen to research the distinction between procedural and substantive and distribute to the committee any information which would be helpful in making that determination. Chairman Hanson also suggested that if the research material could be provided to the committee members prior to the next meeting, that the committee members should be prepared to discuss Rule 1 through 4 of the Rules of Criminal Procedure and make preliminary recommendations as to whether those rules are procedural or substantive.

8. Legislative Update. Carlie Christensen indicated to the committee members that H.B. 79 containing amendments to the bail provisions of the Code had passed the House and had been referred to the Senate. She indicated that she had delivered a letter to Representative Skousen under Chairman Hanson's signature outlining the committee's concerns with the legislation. She indicated that Representative Skousen was willing to modify the legislation only to the extent necessary to make the bill compatible with the proposed constitutional language. Chairman Hanson asked the committee whether there was any action which could be taken by the committee concerning this bill prior to the legislative session. The committee members felt that there was not enough time prior to the session to finalize their recommendations on Rule 27. Chairman Hanson then asked whether committee members individually could take any action which might minimize the problems created by passage of the proposed

legislation. David Schwendiman indicated that he would be willing to meet with Representative Skousen concerning the bill and propose modifications which would make the legislation compatible with the constitutional language. Ms. Christensen recommended that Dave Thompson from the Attorney General's Office be included in that meeting since Mr. Thompson had assisted in the drafting and preparation of the legislation. Professor Frankel also indicated that he would be willing to meet with Representative Skousen. Ms. Christensen offered to assist in arranging the meeting.

9. Publication Schedule. Ms. Christensen indicated that she had been working with the Michie and Code-Co. publishing companies to establish a firm publication date for the rules. She explained that once a firm publication date was established, that the Supreme Court intended to adopt a rule which would contain a timetable for all committees to follow during the rulemaking process. The rule will provide that each committee receives petitions and studies proposed modifications to the Rules for 6 to 8 months of the year and that when the committees complete their study, all of the rules will be submitted to Code-Co at once for publication. The rule will also provide that once the public comment period has expired and the rules have been submitted to the Supreme Court, the Court will have 60 days to act on the proposed rules. Upon expiration of the 60 day period, all modifications approved by the Court would be published in a single volume of Court rules. Any rules which are not acted upon by the Court during the 60 day period, will be held until the next year. Ms. Christensen explained that a uniform rulemaking process would ensure that the Court Rules publication was always current and would streamline the committee's work.

10. Meeting Schedule. The committee agreed to hold its next meeting on March 14, 1988 at 5:30 p.m. at the Administrative Office of the Courts.

11. Adjournment. There being no further business, the meeting was adjourned.

Tab G

MINUTES OF THE
CONSTITUTIONAL REVISION COMMISSION
JANUARY 15, 1988—12 NOON—ROOM 436 STATE CAPITOL

Members Present:	Dr. Karl N. Snow, Jr., Chairman Mr. William G. Fowler, Vice-Chairman Sen. Lyle W. Hillyard Rep. R. Haze Hunter Mr. Clifford S. LeFevre Rep. Ted D. Lewis Mr. Gayle F. McKeachnie Mr. Scott M. Matheson, Jr. Mr. Richard V. Strong Justice Michael D. Zimmerman
Members Excused:	Sen. Wilford R. Black Sen. Arnold Christensen Mr. Raymond L. Hixson Dr. Phyllis C. Southwick Rep. Olene S. Walker Ms. Mary Anne Q. Wood
Also Present:	Ms. Carlie Christensen, Office of the State Court Administrator Judge Scott Daniels, Third District Court Sen. Winn L. Richards
Staff Present:	Robin L. Riggs, Executive Director Joy Jensen, Secretary

1. Call to Order—Chairman Snow called the meeting to order at 12:15 p.m.

2. Bail Provision—Chairman Snow stated that at the last meeting the CRC had requested the Governor's Council on Victims and the Supreme Court's Advisory Committee on Criminal Procedure to make a recommendation for amending Art. I, Sec. 8 of the Utah Constitution. Mr. Riggs distributed copies of the completed proposal to CRC members (copy on file in the Office of Legislative Research and General Counsel).

Chairman Snow then asked Carlie Christensen, Office of the State Court Administrator, to review the recommendation. She stated that it was difficult to find a consensus among members of the advisory committee and that the proposal represents a majority viewpoint and not unanimity. The proposal retains the existing categories of offenders that may be denied bail: persons charged with a capital offense, and persons charged with a felony while on probation or parole or while free on bail awaiting trial on a previous felony charge. She stated that the only difficulty with the language was in defining what standard is meant by "proof is evident or the presumption strong." Most lawyers she contacted did not understand the standard because of the archaic language. As a result, the proposal deletes that language and replaces it with "substantial evidence," which is a more understandable term. The proposal then adds one other category of offender that may be denied bail: persons charged with a crime when the court finds by clear and convincing evidence that the person would constitute a danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.

Ms. Christensen stated that there were two substantial issues of debate concerning the new category. First, the category is all persons charged with a crime, rather than just a felony. The drafting committee initially recommended "felony" because of a concern that under "crime," misdemeanor offenders could be held without bail on evidence unrelated to the offense. However, the majority of the full committee disagreed and retained the word "crime" in the proposal. Second, the standard for determining danger to the community and others is "clear and convincing evidence." The drafting committee initially recommended a standard of "substantial danger." The full committee retained "clear and convincing evidence" because of the overuse of the word "substantial" and a concern that "substantial danger" was ambiguous.

She then explained that the proposed second paragraph provides a right to bail pending appeal as provided by law, as opposed to the first paragraph which provides for pre-conviction bail. She stated that the committee decided to recommend that the Legislature determine the standards for post-conviction bail under the second paragraph. Finally, she stated that two committee members rejected the proposal outright, although a majority of seven members approved it.

The CRC then discussed the use of the word "crime" as opposed to "felony." Judge Daniels, Third District Court, and Ms. Christensen both stated that "crime" provides greater flexibility to judges. Justice Zimmerman and Mr. Fowler argued that the use of the word "felony" was sufficient to protect the public. Justice Zimmerman then stated that under the word "crime," justices of the peace could deny bail for misdemeanor offenses, which concerns him.

MOTION: Justice Zimmerman moved, seconded by Mr. Fowler, to replace "crime" with "felony" in the proposal in the category of persons posing a danger or likely to flee. The motion passed unanimously with all members marked present at the meeting voting in favor.

Sen. Hillyard then suggested that the word "substantial" be inserted before the word "danger" in the proposal where it states "evidence that the person would constitute a danger to any other person or to the community." Rep. Lewis stated that he would prefer to have a lesser standard of proof than a lesser standard of danger. There was additional discussion on this issue.

MOTION: Sen. Hillyard moved, seconded by Rep. Lewis, to insert "substantial" before "danger" in the draft where it refers to danger to others and the community. The motion passed unanimously with all members marked present at the meeting voting in favor.

The CRC also decided to retain the use of the phrase "as prescribed by law" in the second paragraph of the proposal because it can mean statutes, court rules, or court cases. There was also more discussion on the issue of judicial discretion in denying bail under the language of the proposal.

Chairman Snow then introduced Sen. Winn L. Richards, who has already filed a constitutional amendment to make substantially the same changes to the Utah Constitution as those recommended today.

MOTION: Rep. Lewis moved, seconded by Mr. LeFevre, to recommend favorably to the Legislature the proposal, as amended, of the Supreme Court's Advisory Committee on Criminal Procedure to amend Art. I, Sec. 8. Judge Daniels stated that the Governor's Council on Victims would probably agree with the recommendation. The motion passed unanimously with all members marked present at the meeting voting in favor.

Sen. Richards then agreed to substitute the CRC recommendation into his proposal.

3. Other Business—Mr. Matheson distributed a statement on behalf of himself, Chairman Snow, and Justice Zimmerman relating to the fiscal home rule powers of local governments (copy on file in the Office of Legislative Research and General Counsel).

4. Adjournment—The meeting was adjourned at 1:10 p.m.

0336c

Tab H

Tab I

UTAH CODE ANNOTATED

1953

REPLACEMENT

VOLUME 8C

1982 EDITION

Code of Criminal Procedure

77-35-27. Rule 27 — Stays pending appeal. (a) (1) A sentence of death shall be stayed if an appeal or a petition for other relief is pending.

(2) A sentence of fine, imprisonment, or probation shall be stayed if an appeal is taken and a certificate of probable cause is issued.

(3) When an appeal is taken by the state, a stay of any order or judgment in favor of the defendant may be granted by the court upon good cause pending disposition of the appeal.

(b) A certificate of probable cause shall be issued if the court hearing the application determines that there are meritorious issues that should be decided by the appellate court. A certificate of probable cause may be issued by the trial court or, if denied by the trial court, by the court to whom an appeal is taken. The application for a certificate of probable cause shall be in writing, state the grounds for the issuance of the certificate and shall be served upon the prosecuting attorney. A hearing on the application for a certificate of probable cause shall be held after notice to all parties.

(c) If a certificate of probable cause is denied, the defendant shall commence or continue to undergo sentence. If the certificate of probable cause is granted, the court granting the certificate may continue the defendant in custody at an appropriate place of detention, or admit the defendant to bail or release pending appeal on suitable terms and conditions. The decision on the request of the defendant for release to bail is subject to review by the appellate court for abuse of discretion.

History: C. 1953, 77-35-27, enacted by L. 1980, ch. 14, § 1.